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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

MEMORANDUM OF APPELLANT IN RESPONSE TO COURT'S REQUEST.

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At the oral argument of this case yesterday members of the Court propounded to counsel for appellant and appellee certain interrogatories and requested them to file memoranda thereon.

Interrogatory No. 1. Show by the record what companies mentioned in Exhibit No. 13 (R. 590) are not affiliated with appellant or connected in any way with Columbia Gas & Electric Corporation?

Answer.

Hope Natural Gas Company,
United Natural Gas Company.

All other selling companies are affiliated with appellant.

Interrogatory No. 2. What is the difference between the cost and "book value" of the Ohio Fuel Gas Company's leaseholds?

Answer. The record does not disclose the cost of leaseholds. See the testimony of L. A. Seyffert at R. 1045 (Case No. 608). The "book value" as of December 31, 1929, of all the company's leaseholds was $8,418,280.83, city exhibit 27, R. 3020 (Case No. 608). The "book value" of the separate classes of leaseholds does not appear. The City introduced Exhibit 86, R. 3164-5, which sets forth a so-called reproduction cost of No. 1 leaseholds amounting to $1,569,479. This exhibit is explained at R. 1418 and 1440. (At page 104 of appellant's main brief this figure of $1,569,479 is inadvertently referred to as showing the "book value of No. 1 leases.")

Interrogatory No. 3. Does it appear in the record how book costs of leaseholds were made up?

Answer: No, although the testimony of Mr. Seyffert at R. 1045-1046 (Case No. 608) has some bearing on this question.

Interrogatory No. 4. How did appellee determine a system-wide gate rate for the Ohio Fuel Gas Company?

Answer. It valued all of the company's property used in the production and transmission of gas, determined its operating expenses in connection with that service and allocated or apportioned the cost on a sales or M.c.f. basis, R. 138 (Case No. 609).

Interrogatory No. 5. How did appellee arrive at a valuation of $25.00 per acre for No. 1 leaseholds in this case?

Answer. Appellee adopted the amount fixed by it (and approved by the court below) in the Logan case (R. 151).

This finding of appellee was set aside by the court below (R. 70).

Interrogatory No. 6. Does the record disclose earning statements and the capital structure of the Ohio Fuel Gas Company, and of appellant?

Answer. Company Exhibit No. 43 (R. 2899-2907, Case No. 608) sets forth the income of the Ohio Fuel Gas Company for the years 1927, 1928 and 1929 and the balance sheet as of December 31, 1929; also the capital structure and earnings of the entire Columbus group of companies controlled by Columbia Gas & Electric Corporation. City Exhibits No. 46 and 47, R. 3032-3034 (Case No. 608) contain the income statement and balance sheet of the Ohio Fuel Gas Company for the year ending December 31, 1930. Testimony on these subjects is found at R. 888 *et Seq.* (Case No. 608. Company Exhibit No. 8, R. 581 (Case No. 609) contains the income and operating expense of appellant under the former and present schedule of rates. Appellee's determination of appellant's income and operating expenses appears at R. 223. The record does not disclose the capital structure of appellant.

Interrogatory No. 7. Is there a reserve of gas in Class No. 1 leaseholds?

Answer. No. Mr. Seyffert's answer, R. 1052-1054 (Case No. 608) follows:

"If we were confined to the use of Number 1 acreage only, we would very shortly run ourselves into very greatly mounting costs on the one hand or else a decided shortage of gas on the other, and it is the latter that would be more likely to occur, because if we were limited to Number 1 acreage, which, as I recall, is some 291,000 acres, and estimates have been made of reserves under that of say approximately 300 billion cubic feet; at the rate that we are

now producing, assuming that we could buy gas from independents and West Virginia in the same amount that we are buying, the amount of gas in the ground would only be equivalent to about a ten year period and if we were not able to buy this gas from other sources, the amount of gas in the ground would only be equivalent to five or six years' supply if we could get it out of the ground in that time, which would be impossible. If the West Virginia Company were further restricted to only the use of their Number 1 acreage, we would very certainly be compelled to get along without that gas for Ohio, because they could not in turn produce the amounts.

Now, I would like to go a little further there to explain the situation. You have a reservoir with an estimate of a certain amount of gas in it. We have had on that reservoir at the time, December 31, 1929, approximately 3,600 wells. Taking that, together with the dry holes that have been drilled, and the abandoned wells also on Number 1, would indicate that there has been a well drilled to somewhere around from 65 to 75 acres. Now, the company, if they wanted to take the gas out of that area in a proper and economical way, would perhaps not drill any more wells at all on it except those wells that are necessary by reason of lease requirements or offsets by others, that is, wells that we would have to offset others in order to protect our interests and protect the interests of our own leases (sic lessors). Now, if an attempt were made to take gas out of that area in a shorter period, it would mean immediate depletion of the rock pressure, the rock pressure would immediately go down and each well would produce a correspondingly smaller amount of gas or it would take a longer time to get the gas out. Ultimately, the full recovery could be gotten, but it would take a longer period of time.

Now, if that area were drilled without regard to the cost, we would have to put down two or three times as many wells which would reduce the rock pressure. Gas would then flow very much more slowly in the opening made by the well, which in turn could not get out of the well unless the line pressure were reduced, which would mean additional pumping equipment to reduce the line pressure in order to take the gas out of the ground and get it to the market, because, assuming again the market demands being as they are today, we would still need the discharge pressure at the compressor stations that we now need, but the difference between the discharge pressure and the intake pressures would be a great deal different, necessitating therefore a great deal more power to bring that gas from a low pressure, which would be necessary to take it out of the ground, and the higher pressure necessary for the transmission of it to the markets. The result would be that recovering the quantity of gas that is in that area, the price would just mount, two, three, four times, just up to a prohibitive figure, it just wouldn't be done.

The best answer I have to this whole thing is that the property was developed then, is developed now to the best judgment of the men who have been in the business all their lives, and the wells that were then on the property is what should be there in the judgment of the management.

Q. Would the Number 1 acreage of the Ohio Fuel Gas Company be sufficient during the life of this ordinance under question here, that is, from November 1st or 12th, 1929, for five years forward?

A. It would not, except at a very prohibitive cost. Understand, there are enough cubic feet of gas in the ground, but it can not be gotten out in that period, at any cost that is within any reason."

See also appellant's main brief at page 68, et seq., with citations from the record showing that not only is there no reserve in No. 1 leaseholds but that the leaseholds known as No. 2 and a part of No. 3 are being drained by the wells now supplying gas.

Appellee found that class No. 1 leaseholds would be exhausted in three years and two months. It said: "As to amortization we have considered the evidence disclosing that the average life of an Ohio well is seven and one-half years. The depreciation estimated from present rock pressure of each well discloses that there is at this time a depreciation of 58.1126%, leaving the present value of these items of 41.8874% of the original value of the leaseholds.

Considering the present condition of these wells the remaining life expectancy is an average of three years and two months. We have considered that accounts 211, gas well construction, and 212, gas well equipment and leaseholds, are all subject to the proper amortization for the reasons already set forth. Considering the present value of the three items in reference to the remaining life expectancy, we find that the annual amortization should be $4,158,954." (R. 158, Case No. 609.)

This is referred to at page 83 of appellee's brief as "the reversed finding of the majority commission that Class 1 acreage would be exhausted three years and two months after December 31, 1929."

The appellee and court below did not rely on any possible calculation of reserves in No. 1 leaseholds such as mentioned by counsel for the appellee in the oral argument and concerning which this court requested information. Appellee said:

"It is impossible to estimate the gas content of any acreage or the life of its productivity" (R. 151). At R. 76 the court said: "If amortization is to be allowed this company,

it should be based on the probable life of the business and not on the probable life of its producing wells. It is conceded that the life of the company will exceed twenty five years. Hence, if amortization was allowable under the laws of Ohio, it should be spread over a period of five years."

The record clearly shows that the Commission did not make or approve any such computation as is now suggested by counsel for appellee. The Commission and the court below expressly stated it would not approve amortization upon the evidence that, with all of the company's reserves and ability to purchase gas, the life of the business would be approximately 25 years.

Interrogatory No. 8: "What difference (expressed in cents per M.c.f. does the failure of [illegible] holds have on the gate price of gas?

Answer: The difference is [illegible] as follows: The lowest value of the company's reserve acreage testified to by any witness was [illegible] (R. 2910-2911, Case No. 608); [illegible] the gate price; the delay rentals paid by the company on its reserve acreage in the year 1928 amounted to [illegible] (R. 2908, Case No. 608), which divided by the [illegible] m.c.f. of sales requires an additional [illegible] amortization at the rate of [illegible] per annum (R. Case No. 608) adds to the gate price [illegible] a total of 6.7583c per M.c.f.

The following are pertinent provisions [illegible] the Court during oral argument:

The Ohio Constitution, Article IV, [illegible] Supreme Court of Ohio "shall [illegible] proceedings of administrative officers [illegible] by law." Section 947 of the General Code [illegible] follows:

> "A final order made by the Commission shall be reversed, vacated or modified by the Supreme Court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

In *Logan Gas Company v. Public Utilities Commission of Ohio*, 115 O. S., 107, 111, the court said:

> "The single question presented in this case is whether the Logan Gas Company has the right to file a second schedule, Schedule No. 8, establishing further increased rates during the pendency of the hearing as to the reasonableness of the rates shown by Schedule No. 7," and held that a utility does not have that right.

In appellant's reply brief at page 16 an extract is quoted from the brief of the City in the case of the *Columbus Gas and Fuel Company* v. *Public Utilities Commission of Ohio*, and the following statement is made:

> "The special counsel for the City of Columbus in *Columbus Gas & Fuel Company* v. *Public Utilities Commission*, now pending before this Court, who wrote the above paragraph, was a member of the Public Utilities Commission of Ohio at the time of the decision by the appellee of the Logan case therein mentioned. Undoubtedy he knows what he is talking about when he says that 'the $25.00 per acre fixed as the value of the Logan property * * * was practically an arbitrary valuation.'"

Our attention has been called to the fact that the special counsel for the City of Columbus above mentioned ceased to be a member of the Public Utilities Commission of Ohio several months before the decision of the Logan case above referred to. We regret our error and, of course, hasten to correct it.

Statement Showing Confiscation

Value of appellant's property (R. 593)		$1,250,221
Operating expenses allowed by appellee (R. 223)		$678,778
Add to correct appellee's allowance for		
Purchase of gas (R. 581) 1,192,471 m. c. f. *@* 45c	$537,081	
Amount allowed *@* 39c (R. 223)	465,534	71,547
Annual depreciation required (R. 581)	$43,981	
Annual depreciation allowed (R. 223)	13,721	30,260
Return of 8% on $1,250,221	$100,017	
Allowed by appellee, 6¼% on $868,387 (R. 223)	56,445	43,572
Total expenses and return		$823,157
Revenue under rates fixed by appellee (R. 223)		679,444
Deficit		$144,713

Respectfully submitted,

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Washington, D. C.,
March 15, 1934.

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